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SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 751.

CHARLES A. MILLER,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION and ARTHUR E. WEGNER, as Commissioner of Taxation of the State of Wisconsin,

Respondents.

BRIEF OF RESPONDENTS OPPOSING CERTIORARI

JURISDICTION.

Respondents oppose the granting of a writ of certiorari for the reason that no substantial federal question is presented.

STATEMENT OF THE CASE.

Petitioner and his wife, residents of Wisconsin for each of the years 1926 to 1930, inclusive, filed joint Wisconsin income tax returns. They computed and paid their tax

for each year on the combined taxable income pursuant to the provisions of sec. 71.09 (4) (b) Wis. Stats. 1925, created by sec. 2, Ch. 446, Laws of 1925, and later renumbered sec. 71.09 (4) (c). Because of losses of the wife the combined taxable incomes were smaller than the taxable incomes of the petitioner upon a separate return basis.

On November 30, 1931 this Court in *Hoeper v. Tax Comm.*, (1931) 284 U. S. 206, 76 L. ed. 248, 52 Sup. Ct. 120, reversed the decision of the Supreme Court of Wisconsin in *Hoeper v. Tax Comm.*, (1930) 202 Wis. 493, 233 N. W. 100, and held said section of the Wisconsin Statutes unconstitutional.

Thereafter, said years being open to adjustment under the Wisconsin statutes, the Assessor of Incomes audited the said returns and determined the respective Wisconsin taxable incomes of petitioner and his wife separately. Such determination of their taxable incomes upon a separate basis resulted in net taxable incomes of petitioner that were larger than the combined net taxable incomes.

In accordance with provisions of the Wisconsin Statutes petitioner was then given notice of assessment of additional taxes on the difference between his net taxable separate incomes and the net taxable combined incomes. Upon successive reviews by the Wisconsin Tax Commission, the Circuit Court for Milwaukee County and the Supreme Court of Wisconsin such additional assessment was affirmed. It is to review the decision of the Supreme Court of Wisconsin affirming the same that petitioner here seeks a writ of certiorari.

ARGUMENT

Respondents assert that no substantial federal question is presented for the following reasons:

I. HOEPER V. TAX COMM., (1931) 284 U. S. 206, 76 L. ed. 248, 52 S. Ct. 120 ESTABLISHES THE UNCONSTITUTIONALITY OF SEC. 71.09 (4) (c) WISCONSIN STATUTES AND STANDS UNIMPEACHED.

The case of *Hoeper v. Tax Comm.*, (1931) 284 U. S. 206, 76 L. ed. 248, 52 S. Ct. 120 definitely establishes the unconstitutionality of the Wisconsin statute here involved. The sole issue in that case was the constitutionality of sec. 71.09 (4) (b) Wis. Stats., later renumbered sec. 71.09 (4) (c), providing for computation of the annual Wisconsin income tax at graduated rates upon the combined net taxable income of husband and wife.

The State of Wisconsin there contended that said statutory provisions are constitutional. This Court, however, held that such provisions are violative of the equal protection and due process provisions of the Fourteenth Amendment. Ever since, the State in the administration of its income tax has completely disregarded said statutory provisions and treated them as though they never existed.

There has been no decision since the *Hoeper* case that is at all at variance with it or that in any way detracts from the force thereof. Rather it has been cited by this Court in the following cases:

Burnet v. Leininger, (1932) 285 U. S. 136, 142, 52 S. Ct. 345, 347, 76 L. ed. 655, 670;

Heiner v. Donnan, (1932) 285 U. S. 312, 324, 326, 328, 52 S. Ct. 358, 360, 361, 362, 76 L. ed. 772, 778, 779, 790;

Porter v. Commer. Int. Rev., (1933) 288 U. S. 436, 444, 53 S. Ct. 451, 453, 77 L. ed. 880, 885;

Reinecke v. Smith, (1933) 289 U. S. 172, 178, 53 S. Ct. 570, 573, 77 L. ed. 1109, 1113;

Burnet v. Wells, (1933) 289 U. S. 670, 682, 685, 53 S. Ct. 761, 765, 766, 77 L. ed. 1439, 1446, 1447;

Helvering v. City Bank Farmers Trust Co., (1935) 296 U. S. 85, 92, 56 S. Ct. 70, 74, 80 L. ed. 62, 68;

Blair v. Commer. Int. Rev., (1937) 300 U. S. 5, 12, 57 S. Ct. 330, 333, 81 L. ed. 465, 470;

Whitney v. State Tax. Comm. New York, (1940) 309 U. S. 530, 541, 60 S. Ct. 635, 640, 84 L. ed. 909, 915.

In none of these cases is there even the slightest suggestion of a doubt as to its correctness. On the contrary each and every one of such citations is a reliance upon that case as being correct.

II. SEC. 71.09 (4) (c) WISCONSIN STATUTES HAVING BEEN DECLARED INVALID BY THIS COUT, THE STATE OF WISCONSIN IS NOT PRECLUDED FROM THEREAFTER SO TREATING IT AS APPLIED TO THE INCOMES OF PRIOR YEARS STILL OPEN TO ADJUSTMENT.

1. *Treating the statute after this Court's decision in* Hoeper v. Tax Comm. *as of no force or effect is not attacking the constitutionality thereof.*

In the cases of *Amerpohl v. Tax Comm.*, (1937) 225 Wis. 62, 272 N. W. 472 and *McIntosh v. Tax Comm.*, (1937) 225 Wis. 72, 272 N. W. 476, the Supreme Court of Wisconsin held that the action of the state and its taxing authorities, after the decision of this Court in the *Hoeper* case, in treating sec. 71.09 (4) (c) Wis. Stats. as unconstitutional and so applying it, does not constitute attacking the constitutionality of that statute, but is merely giving effect to this Court's determination of that fact, and that this is true even when applied to the taxation of income of years prior to such decision which are still open to audit and adjustment.

The case of *Columbus and Greenville Ry. Co. v. Miller*, (1930) 283 U. S. 96, 75 L. ed. 861, 51 S. Ct. 392, does not support petitioner's contention. It holds that a state or officer thereof cannot challenge the constitutionality of a statute of that state. But, the situation in which that principle is applicable is greatly different from the instant one. There the constitutionality of a state statute which

taxed at a lower rate was challenged by the state tax collector as a basis for taxing at a higher rate under a prior statute. The constitutionality of the statute had never been passed upon by any court and the court held that the rule that a state may not challenge the constitutionality of its own statutes was thus applicable and precluded the state tax collector from justifying the higher tax upon that basis.

The case of *Chicot County Drainage Dist. v. Baxter State Bank,* (1940) 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317, and the quotation therefrom at page 25 of Petitioner's Brief, are not in point for they merely are an application of the rule of *res adjudicata.*

As is shown by the testimony (R. 16), after the decision by this Court in the *Hoeper* case many refunds were granted to taxpayers of taxes for prior years, as a result of the separation of the incomes of husband and wife, where the years were still open to audit and adjustment under the Wisconsin statutes. Some were as the result of claims for refunds filed by taxpayers and some were as the result of audits made by the state tax authorities upon their own initiative. These refunds were granted upon the proposition that having been declared unconstitutional the statute in question is the same as if it never was enacted—it is no law at all. Such action is likewise nothing more than applying and giving effect to this Court's decision in the *Hoeper* case.

2. *The basis for application of the doctrine of estoppel does not exist.*

Daniels v. Tierney, (1880) 102 U. S. 415, 26 L. ed. 187, is a clear case of estoppel because of invoking the benefits

of a statute to the detriment of another and keeping such benefits while endeavoring to escape the liabilities flowing therefrom. The facts in the instant case do not fit that case nor justify an application of the principles thereof. The State here has not availed itself of the benefits of this statute as against the petitioner and then sought to avoid the liabilities to him arising therefrom. Nor has it done so in respect to others.

The only benefit there is has been to petitioner in that he has paid a lower tax than he otherwise would have paid. True it is, that in other cases the application of the family unit or combined income basis has resulted in larger taxes for other taxpayers in which cases the state derived a benefit from the statute. But, that is no basis for an estoppel here.

Furthermore, as previously mentioned, for those years still open to adjustment under Wisconsin statutes, so taxpayers could file claims for refunds or the tax authorities audit the years and assess additional taxes thus found due, refunds were granted in those cases in which it was ascertained that application of this statute resulted in a higher tax than otherwise. As to the years closed to adjustment by the statutes, both the taxpayers and the state were barred from opening them up, which is an effect in the nature of *res adjudicata*.

As previously pointed out the decision in *Chicot County Drainage Dist. v. Baxter State Bank*, (1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. ed. 329 does not rest on any principle of estoppel but upon *res adjudicata*.

Shepard v. Barron, (1903) 194 U. S. 553, 48 L. ed. 1115, cited by petitioner at page 20 is a perfect illustration of the principle that one who has availed himself of the

benefits of a law cannot challenge its constitutionality so as to relieve himself from the liabilities resulting from his voluntary act.

The very essence and basis of an estoppel is completely absent here. It is that there must have been some injury to the party in whose favor it operates. Here petitioner is not hurt by treating sec. 71.09 (4) (c) Wis. Stats. as unconstitutional. All that results is that he pays the taxes which were payable if this involved law had never been enacted. He is in no worse position than he would have been in any event.

In 12 C. J. 772, para. 197 it is said:

> "Even persons to whom the doctrine of estoppel applies * * * are [not] estopped to deny the validity of a statute which has already been declared unconstitutional in the instance of other parties."

As said by the Supreme Court of Wisconsin in *Amerpohl v. State Tax Comm.*, (1937) 225 Wis. 62, 272 N. W. 472, upon this point:— (p. 476)

> "The question here is as to the effect of that determination, and must necessarily be within the power of respondent to raise if they are to enforce the law in accordance with the decision."

In addition, it is inherent in Wisconsin income taxation that the legislature has definitely provided for the correction of taxes paid, whether they be too large or too small, within a certain prescribed time, regardless of why the error occurred. (Secs. 71.10 and 71.11 Wis. Stats. 1925; Sec. 71.115 (1) (a) Wis. Stats. 1937). The corrections here made were timely and in accordance with express provisions of the Wisconsin statutes. Secs. 71.11, 71.12 and 71.17 Wis. Stats. 1931.

III. THERE WAS NO WAIVER BY PEITIONER OF THE CONSTITUTIONALITY OF THE STATUTE IN QUESTION.

The filing of the joint returns and the payment of taxes pursuant thereto on the combined incomes of petitioner and his wife neither expressly nor by the operation thereof effected a waiver by petitioner of the constitutionality of the Wisconsin statute involved. In the first place he had nothing to waive because the validity of the statute operated in his favor, so he could not waive something that benefited him. Secondly there is absolutely nothing in the joint returns that he waived anything. They are silent upon the subject. One would examine the returns in vain to find anything to indicate whether petitioner filed the joint returns because he thought the statute was valid or because he did not but waived any claim as to its invalidity.

Factually, he did not even make any such assertions in filing objections to the assessment as prescribed by sec. 71.12 Wis. Stats. 1931. It was not until in the appeal to the Circuit Court that petitioner made any claim that the filing of the returns and payment of the taxes constituted a waiver.

That no waiver exists solely by virtue of the filing of joint returns and payment of the tax, is well demonstrated by the case of where the tax would be larger on the combined incomes than on the separate incomes. Certainly such a taxpayer would not be deemed to have waived his right to file a timely claim for refund under sec. 71.17 Wis. Stats. for the excessive amount after the decision in the *Hooper* case. That refunds and adjustments may be

made at any time the years are open to adjustment regardless of how or for what reason the incorrect amount was paid, demonstrates that the filing of returns and payment of taxes based thereon does not constitute a waiver of any rights at all but the matter of the correctness of the taxes is open so long as the years are subject to adjustment and not closed under the applicable statutes.

For the above reasons the writ of certiorari prayed for should be denied.

Respectfully submitted,

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